No. 81 5118

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 1981

RECEIVED
JUL 23 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BENNY DIXON,

PETITIONER,

-vs-

ROBERT R. RAINES,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BENNY DIXON
P.O. Box B-27498
Florence, Arizona 85232
Petitioner - Propria Personam

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STATUTES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

BENNY DIXON,

PETITIONER,

- vs -

ROBERT R. RAINES,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Benny Dixon, respectfully prays that a a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on 19 May 1981.

OPINION BELOW

The Court of Appeals entered the Order denying Appellant's notice of appeal as untimely, Federal Rules of Appellate Procedure, Rule 4(A), on April 14, 1981, appendix "A" incorporated herein by reference thereto. Appellant filed motion for reconsideration April 27, 1981, said motion for reconsideration denied May 19, 1981, appendix "B" incorporated herein by reference thereto.

JURISDICTION

The jurisdiction of this Court in invoked under Title 28, U.S.C. Sections 1254, 1257 and 1291.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall...be deprived of life, liberty or property, without due process of law."

"Under the Fifth Amendment any material change invalidates an indictment and deprives the court of the power to try the accused unpon it."

United States Constitution, Amendment VIV:

"Each person shall receive equal protection of the law."

QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner denied due process of law by the Arizona Supreme Court when his Pro Per Petition for Writ of Habeas Corpus, stating a claim that he was incarcerated as the result of an illegal grand jury proceeding, and that the indictment had been impermissably altered, all in violation of the 5th, 6th and 14th Amendents of the United States Constitution?

2. Did the trial court's denial of the defendant's request for a continuance based upon a stated need to acquire a transcript of state witnesses prior sworn testimony constitute error and an abuse of discretion?

3. Did the trial court commit abuse of discretion by allowing evidence of the defendant's prior convictions to be used for impeachment purposes?

4. Did the trial court commit reversable error by denying defendant's request for a mistrial based upon statements made to the jurors by prosecutor?

5. Was the United States Court of Appeals for the Ninth Circuit's determination and order denying Petitioner's application for Certificate of Probable Cause based upon error in the district court filing records?

STATEMENT OF THE CASE

In November, 1979 the Petitioner was convicted of four counts of sales of narcotic, Ariz. Rev. Stat. Sections 36-1002.02. Petitioner was sentenced to concurrent terms of 15.75 years on all counts, the sentence to run consecutive to a previously imposed setence term of 10.5 years. The Arizona Court of Appeals, Division II, affirmed. State v. Dixon, 126 Ariz. 613, 617 P.2d 779 (Ct. App. 1980). The Arizona Supreme Court denied review September 30, 1980. Application for a state Writ of Habeas Corpus was denied November 4, 1980, appendix "C", incorporated herein by reference thereto. Thereafter, state remedies exhausted, Petitioner filed under Title 28, U.S.C.A., Section 2254, a Habeas complaint in the United States District Court in Phoenix, raising five gounds for relief, the contentions raised constituting violations of constitutional dimensions, appendix "D", incorporated herein by reference thereto. Based upon magistrate review and recommendation, the United States District Court denied relief by order and judgement filed January 27, 1981, appendix "E", incorporated herein by reference thereto. Petitioner's motion to rehear, filed February 10, 1981, appendix "F", incorporated herein by reference thereto, was denied by the United States District Court order filed February 11, 1981. Thereafter, Petitioner's notice of appeal to the United States District Court, appealing from the District Court ordering denying motion to rehear, was filed March 19, 1981, said notice of appeal dated February 11, 1981, appendix "G", incorporated herein by reference thereto. Thereafter, Petitioner received United States District Court's order denying Certificate of Probable Cause to Appeal, filed March 27, 1981, appendix "H", incorporated herein by reference thereto. Petitioner thereafter received copy of United States District Office of the letter dated March 27, 1981, appendix "I", incorporated herein by reference thereto. Petitioner mailed to the United States District Court an application for Certificate of Probable Cause and affidavit in support of motion to procedd on appeal in forma pauperis, appendix "J", incorporated herein by reference thereto, said articles not listed in the Document Index for the United States Court of Appeals, appendix "K", incorporated herein by reference thereto. Thereafter, Petitioner received Circuit Court order, appendix "A", dismissing Petitioner's appeal based upon the appellant's notice of appeal being untimely. Petitioner filed motion for reconsideration, said motion dated April 22, 1981, appendix "L",

incorporated herein by reference thereto. The United States Court of Appeals denied said motion for reconsideration, in order dated May 19, 1981, appendix "B".

REASON FOR GRANTING THE WRIT

(1) The Petitioner's conviction and sentence was obtained in violation of substantive due process of law, violative of the due process and equal protection clauses of the Fifth Amendment, Sixth Amendment, and Fourteenth Amendment of the United States Constitution. For the reason that the record supports Petitioner's contention that an unauthorized witness appeared before the grand jurors in proceedings held September 5, 1979 and gave sworn testimony to facts that he had no personal knowledge of; the grand jurors were not appraised of the hearsay nature of said testimony, appendix "M", incorporated herein by reference thereto. The indictment itself was impermissably altered after the grand jury had found the true bill. The grand jurors specifically heard sworn testimony that a sales occurred on June 25, 1979. The indictment upon which Petitioner was tried and convicted alledges no such date and sales transaction, appendix "N", incoprorated herein by reference thereto. Supporting authorities: U.S. v. Prejean, C.A. Tex. (1974) 494 F.2d 495 and U.S. v. Estepa, (1972) 471 F.2d 1132.

(2) The trial court's interpretation of Arizona Rules of Criminal Procedure, Rule 6.1(e) was misinterpreted and the denial of the defendants pro se request for a continuence, based upon his stated need to obtain a transcript of a bond reconsideration hearing whereby the state's witness had appeared and given sworn testimony. It was the defendant's first request for a continuence--the trial court nad no previous knowledge of the case--and it was the defendant's first appearance before the trial judge who had been assigned to the case the previous day. Under Arizona law the charges were punishable by imprisonment of over one hundred years. The trial court's denial of the requested continuance based upon the foregoing constitutes abuse of discretion and denied the defendant substantial due process of law, due process and equal protection of the law, all guaranteed by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. The defendant pro per, expressly stated to the trial court (R.T. Nov. 7, 1980, Id. at page 8, lines 18 through 25):

Defendant

"Your Honor, I would like to present to the court a continuance until I can receive the information on the reconsideration motion that was presented by the County Attorney's Office. I am in the process of trying to get a transcript of that hearing, and it is pertinent to my case...."

Authorities in support: N.Y. People v. Harper, 124 N.Y.S. 12, 139 App. Div. 344; N.D. State v. Chase, 117 N.W. 537, 17 N.D. 429, 17 Ann. Cas. N.D.; and State v. Adair (1970) 106 Ariz. 58, 470 P.2d 671.

(3) Admission of evidence of the defendant's prior convictions denied the defendant a fair trial, and in combination with the trial court's failure to give the defendant's requested Jury Instruction No. 3 regarding the limited use to be made of the prior convictions, constitutes a violation of due process, guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Authorities in support: State v. Canedo, 608 P.2d 774; State v. Finley, 85 Ariz. 327, 335, 338 P.2d 790. Also, a purusal of State v. McClellan, (1980) 611 P.2d 948 in comparison with State v. Dixon, 126 Ariz. 613, 617 P.2d 779 (Ct. App. 1980) shows a distinct denial of equal protection of the law, as guaranteed by the Fourteenth Amendment to the United States Constitution. Culp v. Maughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed. 2d 368 (1973).

(4) The trial court erred in denying defendant's request for a mistrial based upon remarks by the prosecutor constituting prejudicial prosecutorial misconduct. Id. R.T. Nov. 8, 1979 at P. 47, lines 1 through 3:

"Head-on colliding with the truth told you by the officers is the testimony of Benny Dixon, a convicted felon."

The statement would not have appropriate had the defendant's trial been held in a bar room...respectfully. Based upon same, and denial of argument for mistrial, the defendant was denied a fair trial as guaranteed by the Constitution of the United States.

(5) The District Court's failure to rule upon the stated claim of an illegal grand jury indictment and proceeding held is error and a denial of due process; state remedies were exhausted upon the issue, appendix "O", incorporated herein by reference thereto. The district court clerk's filing of Petitioner's pleadings and submissions are misleading. Petitioner's Notice of Appeal was timely filed, appendix "K", incorporated herein by reference thereto. Petitioner's Notice of Appeal, appendix "G".

incorporated herein by reference thereto, was mailed to the United States District Court on the 11th day of March, 1981 and specifically appeals from District Court order dated February 11, 1981. The Circuit Court Index Document No. 12 lists a filing date of March 19, which constitutes a filing delay of eight days. Arizona State Prison is approximately sixty miles from the United States District Court in Phoenix. See appendix "K". The United States Court of Appeal for the Ninth Circuit made its determination denying Petitioner's motion for reconsideration, appendix L, incorporated herein by reference thereto, upon document filing dates not in accord with, and far in excess of, the mailing dates displayed on the U.S. District Court submissions mailed by the Petitioner from Arizona State Prison.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a writ of certiorari should issue to review the judgement of the United States Court of Appeals.

Respectfully submitted,

Benny Dixon

BENNY DIXON
P.O. Box B-27498
Florence, Arizona 85232

SUBSCRIBED AND SWORN TO BEFORE ME THIS 20TH DAY OF JULY, 1981.

Michael A. Shermetaro

NOTARY PUBLIC

My Commission Expires Jan. 27, 1985

My Commission Expires

One copy each mailed to:

Office of the Clerk
U.S. Supreme Court

and

Robert K. Corbin, Atty. Gen.
Jack Roberts, Asst. Atty. Gen.
State Capital Building, Westwing 2nd Flr.
Phoenix, Arizona 85007

81 5118

FILED

APR 14 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENNY DIXON, Plaintiff-Appellant, vs. ROBERT RAINES, Defendant-Appellee.	No. 81-8042 DC# CV 80-968-PHX-WEC Arizona (Phoenix) ORDER

Before: PREGERSON and BOOCHEVER, Circuit Judges

Appellant's notice of appeal is untimely. Fed. R. App. P. 4(a). This appeal is therefore dismissed for lack of jurisdiction.

CR CAL 4/6/81

Appendix - A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 19 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

BENNY DIXON, Plaintiff-Appellant, vs. ROBERT RAINES, Defendant-Appellee.	No. 81-8042 DC# CV 80-968-PHX-WEC Arizona (Phoenix) ORDER

Before: PREGERSON and BOOCHEVER, Circuit Judges

Appellant's motion of April 27, 1981 for reconsideration of this court's order dismissing this appeal is denied.

4/30/81

(CR CAL 4/6/81)

Appendix - B

MARYANN HOPKINS-YOUNG
CLERK

Supreme Court

STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
Phoenix 85007

TELEPHONE
255-4536

November 5, 1980

BENNY DIXON,

Petitioner,

vs.

ROBERT R. RAINES,

Respondent.

Supreme Court
No. H-595-2

Pima County
No. CR-01750

The following action was taken by the Supreme Court of the State of Arizona on November 4, 1980 in regard to the above-entitled cause:

"ORDERED: Petition for Writ of Habeas Corpus - DENIED."

MARYANN HOPKINS-YOUNG, Clerk

By Linda Smith
Deputy Clerk

TO:

Benny Dixon, P. O. Box B-27498, Arizona State Prison, Florence, Arizona 85232
Hon. Robert K. Corbin, Attorney General, 200 West Wing, State Capitol Building, Phoenix, Arizona 85007 Attn: Jack Roberts
Stephen D. Neely, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701

Appendix - C

IN THE SUPREME COURT OF THE UNITED STATES

JUL 23 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

BENNY DIXON, Petitioner

v.

81 5118

ROBERT R. RAINES

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, Benny Dixon, asks leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in both the U.S. District Court and the U.S. Court of Appeals. Petitioner's affidavit in support of this motion is attached hereto.

Benny Dixon
BENNY DIXON

AFFIDAVIT

I, Benny Dixon, being first duly sworn according to law, depose and say that I am the petitioner in the above-entitled case; that, in support of my motion to proceed without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed?

A. YES. I am an inmate of the Arizona State Prison and am employed in that facility as a kitchen porter. I receive wages in the sum of thirty dollars ($30.00) per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

A. NO.

3. Do you own any cash or checking or savings account?

A. NO.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishing and clothing)?

A. NO.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

A. NONE.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Benny Dixon
BENNY DIXON
P.O. Box B-27498
Florence, Arizona
85232

SUBSCRIBED AND SWORN TO BEFORE ME THIS 20th DAY OF July, 1981.

Michael A. Chernetsky
My Commission Expires Jan. 27, 1985

NO. 81-5118

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

BENNY DIXON,

Appellant-Petitioner,

-vs-

ROBERT R. RAINES,

Appellee-Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

JACK ROBERTS
Assistant Attorney General
State Capitol Building
West Wing -- Second Floor
Phoenix, Arizona 85007

Attorneys for RESPONDENT

NO. 81-5118

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

BENNY DIXON,

Appellant-Petitioner,

-vs-

ROBERT R. RAINES,

Appellee-Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

1. Does petitioner's failure to timely object to grand jury proceedings constitute an independent and adequate state procedural ground barring review of this issue?

2. Since petitioner told the trial court the morning before his trial that he was ready to proceed, did the trial court abuse its discretion by refusing to grant a continuance?

3. Can petitioner show infringement of a federally protected right based on the trial court's ruling admitting evidence of petitioner's prior convictions?

4. Is review of allegedly improper comments by the prosecutor barred by defense counsel's failure to object to any of them?

TABLE OF CASES AND AUTHORITIES

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State v. Stone 122 Ariz. 304 594 P.2d 558 (Ct.App. 1979)	5
United States v. Fowler 605 F.2d 181 (5th Cir. 1979)	5
United States v. Gates 557 F.2d 1086 (5th Cir. 1977)	5
United States v. Oaxaca 569 F.2d 518 (9th Cir. 1978)	6
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United States v. Wiggins 566 F.2d 944 (5th Cir., 1978)	7
Ungar v. Sarafite 376 U.S. 575 84 S.Ct. 841 11 L.Ed.2d 921 (1964)	5
Wainwright v. Sykes 433 U.S. 72 97 S.Ct. 2497 53 L.Ed.2d 594 (1977)	2, 8

AUTHORITIES

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Rule 6.1(e) 5

Arizona Rules of Evidence
Rule 609(A) 6

STATEMENT OF THE CASE

While working in an undercover narcotics investigation, Officer Jesse Ochoa was approached by petitioner May 23, 1979, in the vicinity of University and Tenth Avenue, an area known as the "tree" in Tucson. Dressed in a black hat, yellow shirt, and brown pants, petitioner asked Officer Ochoa whether he was "looking to cop" (wanted to buy heroin). (R.T. of Nov. 8, 1979, at 18-19; exhibit C.) On that occasion, Ochoa bought two "papers" of heroin from petitioner. Ochoa noted that petitioner had a very distinctive physical characteristic -- parts of fingers missing from his right hand. (Id. at 19-20.) Ochoa's backup, Officer George Smith, was not close enough to observe the face of the individual from whom Ochoa purchased heroin, but Smith did corroborate the clothing that person wore. (Id. at 95.) On June 14, 20, and 22, Ochoa made three more purchases of heroin from petitioner. On those occasions, petitioner identified himself as "Benny." During this period, petitioner was awaiting trial on a charge of possession of narcotics for sale, alleged to have occurred on October 9, 1978. Petitioner was convicted of that charge July 10, 1979, and the conviction was affirmed. State v. Dixon, 125 Ariz. 442, 610 P.2d 76 (Ct.App. 1980). In November 1979, petitioner was convicted of the four sales of heroin originating in May and June of that year. He was sentenced to concurrent terms of 15.75 years on all four counts. The Arizona Court of Appeals affirmed. State v. Dixon, 126 Ariz. 613, 617 P.2d 779 (Ct.App. 1980). The Arizona Supreme Court denied review September 30, 1980. Petitioner's application for a state writ of habeas corpus was denied November 4, 1980.

Petitioner then sought relief in the federal district

court. Finding no merit in any of petitioner's arguments, the district court dismissed the petition January 27, 1981. Similarly, the district court denied a motion for rehearing and a certificate of probable cause, deeming the appeal "frivolous" and the notice of appeal not timely filed. The Ninth Circuit dismissed the appeal as untimely April 14, 1981, and denied reconsideration May 19, 1981.

REASONS FOR DENYING THE WRIT

ARGUMENTS

I

PETITIONER'S FAILURE TO TIMELY RAISE COMPLAINTS ABOUT GRAND JURY PROCEEDINGS CONSTITUTES AN INDEPENDENT AND ADEQUATE STATE PROCEDURAL GROUND THAT BARS REVIEW.

Petitioner alleges that he was convicted upon a charge for which he was not indicted, and that an "unauthorized person" gave hearsay testimony before the grand jury that indicted him. Petitioner failed to raise any claims about grand jury proceedings until he filed a petition for habeas corpus with the Arizona Supreme Court. Under the Arizona Rules of Criminal Procedure, petitioner waived the right to challenge grand jury proceedings by not moving for a new finding of probable cause within the prescribed period. Rule 12.9, Arizona Rules of Criminal Procedure; State v. Smith, 123 Ariz. 243, 599 P.2d 199 (19[illegible]). Thus, even if petitioner had raised these issues on appeal, review would have been precluded for failure to comply with Arizona's procedural rule. State v. Smith, supra. Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), forecloses review of this issue. Furthermore, the indictment returned against petitioner alleged sale of narcotics on May 23, June 14, 20, and 22, 1979. Eyewitness

testimony at trial established sales by petitioner on those dates. Petitioner's complaint apparently is directed to the fact that, during grand jury proceedings, the prosecutor asked a witness whether one transaction occurred on June 25. That date should have been June 20. The indictment returned did not charge an offense on June 25; but instead on May 23, June 14, 20, and 22. There was no variance between the written indictment and the testimony at trial. Petitioner was not convicted on a charge for which he was not indicted.

Petitioner raises before this Court an argument he did not present to any Arizona court or the federal district court. He alleges the presence of an "unauthorized person" in the grand jury proceedings, and complains that hearsay was introduced. Aside from the fact that petitioner has waived this argument also by failing to raise it timely, the argument has no merit. The law of Arizona provides that a grand jury indictment may be returned on the basis of hearsay. State v. Baumann, 125 Ariz. 404, 610 P.2d 38 (1980). Moreover, Agent Armando Saenz, who testified before the grand jury that indicted petitioner, did not say that he personally witnessed any drug transaction; he stated that Agent Ochoa, who later testified at trial, participated in the four transactions with petitioner. Agent Ochoa testified at trial from his personal knowledge and participation in all four sales of heroin from petitioner to Ochoa. Thus, petitioner's argument has no merit, and is procedurally barred for failure to raise it timely. Wainwright v. Sykes, supra.

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER A CONTINUANCE WHEN PETITIONER PROCEEDED PRO SE UNTIL THE MORNING OF TRIAL.

Petitioner alleges deprivation of constitutional rights due to the trial court's denial of his motion to continue made on the morning of trial. Dissatisfied with his first appointed attorney, petitioner filed three pro se motions, among them a request to proceed pro se. These motions, which include citations of authority, indicate familiarity with the criminal justice system. At a hearing on October 15, Judge Norman S. Fenton questioned petitioner about his desire to represent himself. Petitioner stated that he was no novice to criminal proceedings and that he felt competent to represent himself. (R.T. of Oct. 15, 1979, at 5-6; exhibit A.) Michael Pollard was appointed as advisory counsel and trial was set for November 7. The day before trial, petitioner indicated that he was ready to proceed. (R.T. of Nov. 7, 1979, at 11; exhibit B.)

The morning of trial, petitioner, accompanied by advisory counsel, presented a habeas corpus petition and attempted to reargue a previously denied motion to dismiss the indictment. Having lost these motions, petitioner moved to continue in order to secure the transcript of a hearing at which Officer Ochoa testified. The trial court denied the motion, but ordered a transcript of the hearing prepared within 24 hours. (R.T. of Nov. 7, 1979, at 26; exhibit B.) Petitioner gave no other reason for seeking a continuance. The prosecutor then requested that the trial court apprise petitioner of the fact that he had no constitutional right to hybrid representation. (Id.)

State v. Stone, 122 Ariz. 304, 594 P.2d 558 (Ct.App. 1979). Immediately after learning that he could not represent himself and have counsel speak for him also, petitioner withdrew his waiver of counsel and asked for appointed counsel. (R.T. of Nov. 7, 1979, at 16; exhibit B.) The trial court appointed Mr. Pollard, who had been advisory counsel for 3 weeks, as trial counsel.

The Arizona Court of Appeals held that the trial court properly denied the continuance, regardless of any reference to Rule 6.1(e), Arizona Rules of Criminal Procedure. 617 P.2d at 782. There is no constitutional right to a continuance. This Court has held that whether or not denial of a continuance amounts to a violation of due process depends upon the totality of circumstances and the reasons presented to the trial judge at the time the request is made. Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). "The right to assistance of counsel, cherished and fundamental though it may be, may not be put to service as a means of delaying or trifling with the court." United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979). See also United States v. Gates, 557 F.2d 1086 (5th Cir. 1977).

When he requested a continuance, petitioner's sole reason was to procure a transcript. That transcript was provided within 24 hours. Moreover, petitioner's only defense was mistaken identity. Considering four face-to-face sales to Officer Ochoa and the fact that petitioner has parts of fingers missing from his right hand, the Arizona Court of Appeals concluded that his defense was totally destroyed and that a continuance would not have diminished the overwhelming evidence against petitioner. 126 Ariz. at 616, 617 P.2d at 782. Respondent submits that

petitioner had no valid basis for a continuance and has not demonstrated any prejudice resulting from denial of that motion. The district court found no merit in this argument.

III

RULINGS ON ADMISSIBILITY OF EVIDENCE ARE MATTERS FOR THE STATE COURT AND PETITIONER CAN SHOW NO VIOLATION OF A FEDERAL CONSTITUTIONAL RIGHT.

At trial, the state sought to impeach petitioner's credibility by introducing previous convictions for burglary, theft, and possession of heroin for sale. Since petitioner denied that he had ever seen the undercover officer to whom he made four heroin sales, petitioner's credibility was of paramount importance. The trial court specifically ruled that, under Rule 609(A), Arizona Rules of Evidence, the probative value of the prior convictions outweighed the possible prejudice. (R.T. of Nov. 8, 1979, at 138-39); exhibit C.)

Admissibility of evidence is a matter of state law, and presents no constitutional question unless there is an error of such magnitude that it denies petitioner fundamental due process. Crisafi v. Oliver, 396 F.2d 293 (9th Cir.), cert. denied, 393 U.S. 889 (1968). Under Rule 609(A) -- both state and federal versions -- the trial court has wide discretion in determining whether to exclude evidence of prior convictions. United States v. Oaxaca, 569 F.2d 518 (9th Cir. 1978); United States v. Prewitt, 534 F.2d 200 (9th Cir. 1976). The findings of the trial court should not be disturbed in the absence of a clear showing of abuse. United States v. Ortiz, 553 F.2d 782 (2d Cir.), cert. denied, 434 U.S. 897 (1977). Prior convictions are not inadmissible simply because they are similar to the

offense for which the defendant is on trial. United States v. Wiggins, 566 F.2d 944 (5th Cir.), cert. denied, 436 U.S. 950 (1978); United States v. Ortiz, surpa. Since petitioner placed his credibility at issue by taking the stand and testifying that he had never seen Officer Ochoa, respondent submits that the prior convictions were properly admitted for impeachment. The district court found impeachment was properly permitted.

Contrary to petitioner's assertion, his counsel did not request any instruction about the limiting use to be made of prior felony convictions with regard to petitioner's credibility. In fact, it was the prosecutor, not defense counsel, who requested that the trial court give an instruction about the limited consideration the jury should give to the fact that petitioner had been previously convicted of other felonies. (R.T. of Nov. 9, 1979, at 55; exhibit D.) Defense counsel's instruction number 3 was designed to instruct the jury that petitioner was a competent witness on his own behalf. During voir dire, the trial court asked potential jurors if they would give the defendant the same credence as any other witness and judge him under the same rules of evidence as all other witnesses. (R.T. of Nov. 7, 1979, 69-70, 84; exhibit B.) Before the jury retired to deliberate, the judge gave an instruction about the jury's duty to evaluate the credibility of each witness according to the same criteria. (R.T. of Nov. 9, 1979, at 49-52; exhibit D.) The district court found that petitioner's complaints about jury instructions were meritless.

. . .

IV

PETITIONER WAIVED ANY OBJECTION TO PROSECUTORIAL COMMENTS BY FAILING TO OBJECT TIMELY.

Petitioner asserts that the prosecutor made improper comments during closing arguments. Defense counsel did not object to the state's comments in closing argument, and the Arizona Court of Appeals ruled that petitioner waived any objection. 126 Ariz. at 617, 617 P.2d 1340 (1977). Defense counsel's failure to comply with Arizona's contemporaneous objection rule constitutes an independent and adequate state procedural ground that precludes review of this matter. Wainwright v. Sykes, supra. The district court found that petitioner had shown neither cause for failing to object timely, nor prejudice, and held that it was precluded from reviewing the matter.[1]

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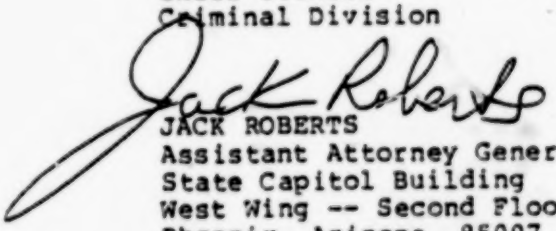
1. Because petitioner's fifth "argument" is merely a complaint about filing dates, respondent will not respond.

CONCLUSION

There is no compelling reason to grant certiorari. Every court that has considered petitioner's arguments -- including the federal district court -- has found them to be without merit. Respondent submits that petitioner has neither alleged nor demonstrated any error of constitutional magnitude, and respectfully requests that the Court deny certiorari.

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COPY of the foregoing mailed this 19th day of August, 1981, to:

Benny Dixon
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K.D.

NO. 81-5118

IN THE SUPREME COURT OF THE UNITED STATES

BENNY DIXON,

Appellant-Petitioner

-vs-

ROBERT R. RAINES,

Appellee-Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Benny Dixon
P.O. Box B-27498
Florence, Arizona 85232
Petitioner Propria Personam

10/

NO. 81-5118

IN THE SUPREME COURT OF THE UNITED STATES

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-vs-

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OPPOSITION REPLY TO

RESPONSE TO PETITION FOR

WRIT OF CERTIORARI

1. Does petitioner's failure to timely object to grand jury proceedings constitute an independent and adequate state procedural ground barring review of this issue?

2. Since petitioner told the trial court the morning before his trial that he was ready to proceed, did the trial court abuse its discretion by refusing to grant a continuance?

3. Can petitioner show infringement of a federally protected right based on the trial court's ruling admitting evidence of petitioner's prior convictions?

4. Is review of allegedly improper comments by the prosecutor barred by defense counsel's failure to object to any of them?

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Appendix

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C - I Police Reports

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Excerpt R.T. Nov. 9, 1979

MEMORANDUM OF POINTS AND AUTHORITIES

REASONS FOR GRANTING THE WRIT

Reply to Respondent Argument I

In reply to Respondent's submission that failure of the Petitioner to timely raise complaints pertaining to grand jury proceedings constitutes an independent and adequate state procedural ground that bars review, Petitioner opposes and replies as follows:

Petitioner alledges and has substantiated by court documented fact that he is imprisoned upon a charge which he in fact has not been indicted upon. Respectfully, Petitioner invites the Court's attention to transcript of grand jury hearing September 5, 1979, Appendix M, previously submitted. Specifically, Id. at p.4, lines 8 through 20.

Prosecutor

Q. On the 25th of June was there a third purchase made?

Witness--Agent Saenz

A. Yes, there was.

A perusal of the charging indictment reveals no such date as June 25, 1979. The third count instead lists a date of June 20, 1979 and substantiates Petitioner's claim that the charging indictment upon which he was tried and convicted has been and was impermissably altered, causing a conviction to be had upon a crime not submitted to the grand jurors which found the True Bill. Petitioner respectfully submits for the consideration of the Court that a person cannot be convicted of an offense not charged against him by indictment or information. State v. Rogers, (1976) 113 Ariz. 6, 545 P.2d 930. The fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence. Miller v. Pate, 386

U.S. 1, 87 S.Ct. 785, 17 L.Ed. 2d 690 (1967). Not to be found upon the face of the charging indictment upon which the Petitioner was tried and convicted is an offense dated June 25th, 1979. The Respondent stipulates that the Petitioner is correct, but that state's material witness to the alledged crimes (Agent Jesse Ochoa) testified to a crime alledged to have occurred on June 20th 1979. Respondent's submission substantiates an impermissably altered grand jury indictment contravening U.S.C.A., Amendment Five. Just as there is a lack of due process and a failure of a fair hearing when evidence is presented to grand jury by an unauthorized person acting as prosecuting attorney, there is a lack of due process and an injury to system when a county attorney improperly attempts to influence actions of a grand jury. 17 A.R.S., Rules of Crim. Proc., Rule 100, 103, 169. State v. Good, 460 P.2d 622, 10 Ariz. App. 556. A person cannot be convicted of an offense not charged against him by indictment or information. State v. Rogers, (1976) 113 Ariz. 6, 545 P.2d 930. Agent Saenz, the witness that testified at the grand jury hearing, was not a material witness to the crimes alledged; the grand jurors were not appraised of such, nor did Agent Saenz appear at the defendant's trial. His sworn testimony was different (admitted by Respondent) than the testimony given at the Defendant's trial by state witness, Agent Ochoa. Compare United States v. Jett, C.A. Mass. (1974) 491 F.2d 1048. There the grand jurors were fully appraised of the nature of the testimony, the reason and informed that the witness would be available to testify at trial. The United States Supreme Court held in Fay v. Noia, 83 S.Ct. 822, 372 U.S. 391 that Habeas Corpus lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous, but is void, and therefore Res Judicata is inapplicable in a Habeas Corpus proceeding. The courts have consistently ruled that a waiver of fundamental error must be knowingly and intelligently waived by the defendant. Humphrey v. Cady, (1972) 92 S.Ct. 1048, 405 U.S. 504, 31 L.Ed. 2d 394; Mata v. Summer, 611 F.2d 754 (9th Cir. 1979). A conviction

may be set aside despite a lack of objection at trial if fundamental error was committed; fundamental error is such error as goes to the foundation of the case or which takes from the defendant a right essential to his defense: denial of a fair trial would be such error. State v. Nettz, 114 Ariz. 296, 560 P.2d 814. Grand jury procedures must satisfy the requirements of federal and state constitutional and statutory guarantees. Petitioner respectfully submits that the grand jury proceedings contravened the confrontation clause, U.S.C.A., Amend. Six, which states:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Arizona Rules of Evidence, Rule 103(d) states:

> "Nothing in this rule precludes taking notice of errors affecting fundamental rights, although they were not brought to the attention of the court."

Based upon the foregoing, and the previously submitted contentions, factually documented, Petitioner Moves this Court, which is the guardian of the Petitioner's constitutional rights, to grant the writ and reverse the sentence and conviction found upon an unconstitutionally amended indictment.

Reply to Respondent Argument II

The trial court did abuse its discretion in denying Petitioner a continuance when Petitioner proceeded Pro Se until the morning of the trial.

Respondent submits that the day before trial, Petitioner stated that he was ready to proceed; however, he fails to inform the Court that the predawn alert held the day before trial was presided over by the Honorable Judge, Norman S. Fenton, who was afterwards affidavited, and that the defendant was not bound by the previous statement of readiness. Petitioner respectfully submits for the consideration of the Court that an announcement of ready for trial before a disqualified judge does not amount to waiver. N.Y. People v. Harper, 124 N.Y.S. 12, 139 App. Div. 344. Particular circumstances may control in determining whether the request is made in time, or should be granted, although not made in time. N.D. State v. Chase, 117 N.W. 537, 17 N.D. 429, 17 Ann. Cas. N.D. Here the defendant expressly stated to the trial court, Id at R.T., Nov. 7, 1980, p.8, lines 18 through 25, Appendix A-1, incorporated herein by reference thereto.

Defendant

> "Your Honor, I would like to present to the Court a continuance until I can receive the information on the reconsideration motion that was presented by the County Attorney's office. I am in the process of trying to get a transcript of that hearing, and it is pertinent to my case."

The Court, l. 24 and 25

> "I really don't understand what you are asking for, Mr. Dixon."

The dialog, appertaining to the defendant's request for a continuance in order to obtain a transcript of the bond reconsideration hearing at which the state's witness, Agent Ochoa, had previously testified continued, and substantiates that: (1) the trial court is not familiar with the prior proceedings held in the case. (2) The request is in fact not a manipulati ↄ, but based upon a substantial need. (3) The pretrial hearing before the court is de nevo in every respect, the defendant having not appeared before the trial court previously.

(4) The case record substantiates that no previous continuances had been sought. Based upon the circumstances, Petitioner submits for the consideration of the Court that the court's denial of the requested continuance constitutes an abuse of discretion. Where an important member of a partnership is involved in a trial and one of its attorneys is engaged in another court, denial of a motion for continuance is an abuse of discretion and reversable error. Camelback Partners v. Weber, 9 Ariz. App. 452, 453 P.2d 548 (1969). Petitioner, further, respectfully submits that the trial court's denial of the defendant's request for a continuance contravened Arizona Rules of Criminal Procedure, Rule 16.6, Omnibus Hearing. Subsection a., Scope of Proceeding, states:

> "The court shall hold an omnibus hearing unless it determines that the hearing will not serve a useful purpose in a particular case. [Emphasis added]
> The court shall:
>
> (1) Hear all motions made at or prior to the hearing;
> (2) Obtain stipulations to facts relevant to the case;
> (3) Consider and determine any other matters which will promote a fair and expeditious trial; and
> (4) Set such further hearings for the taking of evidence or argument of motions as are needed.

There had been no prehearing conference which is made mandatory by Arizona Rules of Criminal Procedure, Rule 16.5(A). The denial of a continuance based upon the defendant's request substantiating good cause, and the state's non-compliance with Ariz. R. Crim. Proc. Rules 16.5,6 and subsections, constitutes a denial of substantive due process of law, a denial of procedural due process, and equal protection of the law contravening the 5th, 6th, and 14th Amendments of the United States Constitution. Based upon the foregoing, Petitioner respectfully submits that he was denied a fair trial as

guaranteed by U.S.C.A. and the constitution and laws of the State of Arizona. This Court has held that whether or not denial of a continuance amounts to a violation of due process depends upon the totality of circumstances and the reasons presented to the trial judge at the time the request was made. Here the circumstances substantiated are: (1) the defendant's stated need for the state's testifying witness's testimony at a previous hearing. (2) The defendant stated to the trial judge that the witness's testimony was pertinent to the case. (3) There had been no previous request for a continuance. (4) The trial judge had no prior factual knowledge of the case as indicated from the transcript of the November 7, 1979 pretrial hearing, excerpt appendix A-I, included herein. Respondent submits that the transcript was provided within 24 hours, but fails to state, as substantiated by court record, that the defendant, representing himself, was denied the requested transcript. Respondent further submits that considering four face to face sales to Officer Ochoa and the fact that Petitioner has parts of fingers missing from his right hand, the Arizona Court of Appeals concluded that his defense was totally destroyed and that a continuance would not have diminished the overwhelming evidence against the Petitioner. Respectfully submitted for the consideration of the Court is the fact that Petitioner did request a transcript of Agent Ochoa's testimony and that said request was denied. Said denial is reversable error. State v. Tomlinson, 121 Ariz. 313, 589 P.2d 1345 (1978). Petitioner respectfully submits that the overwhelming evidence introduced at trial to the effect that Petitioner had missing fingers is absent from the identification made by Office Ochoa under oath at the Reconsideration of Bond Hearing held September 7, 1979, Appendix B-I, incorporated herein by reference thereto. Absent from the record of this case is a disclosure appertaining to the person with whom Agent Ochoa dealt or the Petitioner having parts of fingers on the right hand missing. See police reports, Appendix C-I, incorporated herein by reference thereto.

The foregoing documents that Agent Ochoa did not disclose that the person with whom he dealt had parts of fingers missing. Agent Smith, who was Agent Ochoa's back-up and servailance person on all four sales occasions, testified at Petitioner's trial that he did not know that the Petitioner had parts of fingers missing until the day of his arrest, and further documents that Agent Ochoa never revealed to him that the person with whom he had dealt had parts of fingers missing. See excerpt of November 8, 1979 trial transcript, Appendix D-I, incorporated herein by reference thereto, Id at R.T. of Nov. 8, 1979, p. 117, lines 4 through 13.

Defense Counsel

Q. Officer, are you telling the jury that on either May the 23rd or June the 14th or June the 20th or June the 22nd, you were close enough to see that Mr. Dixon didn't have any fingers on his hand, or is it based upon examination of him here in the court room?

Agent Smith

A. No, sir, it is based upon the day that the arrest was made. There were no other persons that were arrested on the day of the arrest that....

Petitioner respectfully submits that the foregoing factualizes and substantiates that the Petitioner's defense was prejudiced by the trial court's denial of a continuance based upon the Petitioner's stated need to acquire a transcript of a hearing wherein the state's witness (Officer Ochoa) had given testimony, that testimony being different from the testimony given at Petitioner's trial. This Court stated in Feretta v. California (1975) 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562, through the opinion delivered by Mr. Justice Stewart: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the

the right to make his defense. It is the accused, not counsel, who must be informed of the nature and cause of the accusation, who must be accorded compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation--to make one's own defense personally--is thus necessarily impled by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. Petitioner respectfully submits that the denial of the request for a continuance totally destroyed the right to self-represenation guaranteed by U.S.C.A., Amendment Six.

Petitioner respectfully submits that the pre trial motions filed pro per and the public defender's motion to withdraw substantiate that the defendant/Petitioner herein intended to represent himself. See Motion to Dismiss Indictment, Motion to Proceed Pro Per and later Appointment of Counsel, Application for Withdrawal and R.T. of proceedings, October 15, 1979. Appendix E-I through H-I, incorporated herein by reference thereto. Appendix A-I, refutes Respondent's submission that the trial court denied the motion but ordered a transcript prepared within 24 hours (R.T. of Nov. 7, 1979 at 13). Petitioner respectfully submits for the consideration of the Court that based upon the court's denial of a transcript of the witness's testimony, there having been no evidentiary or omnibus hearing, any sane person (respectfully) whould have relinquished self-representation. The appointment of the Public Defender's Office once again, after the withdrawal motion had been granted (Appendix G-I) in fact thrust counsel upon the defendant, under the prevailing circumstances. Where public defender has been relieved of duty and new counsel appointed for accused, public defender had no standing to bring motion for his reappointment, and court was without jurisdiction to grant motion. State v. Madrid (1970) 105 Ariz. 534, 468 P.2d 561. Criminal defendant

has the right to adequate and effective assistance of counsel, and that right necessarily includes allowance to counsel of reasonable time to prepare defense. State v. McWilliams, (1968) 103 Ariz. 500, 446 P.2d 229.

Based upon the foregoing, Petitioner submits, respectfully, that he was denied a fair trial in contravention of Amendments Five, Six and Fourteen, U.S.C.A.

Reply to Respondent Argument III

RULINGS ON ADMISSIBILITY OF EVIDENCE ARE MATTERS FOR THE STATE COURT AND PETITIONER CAN SHOW NO VIOLATION OF A FEDERAL CONSTITUTIONAL RIGHT

Respondent submits that at trial the state sought to impeach Petitioner's credibility by introducing previous convictions, since Petitioner denied that he had ever seen the undercover officer whom he was accused of selling heroin to on four separate and different occasions; Petitioner's credibility was of paramount importance. Petitioner respectfully submits for the consideration of the Court that the trial court's ruling under Rule 609(A), Arizona Rules of Evidence, constitutes a violation of substantive due process of law, and denied Petitioner a fair trial, contravening Amendments 5, 6, and 14, U.S.C.A. Rule 609(A) "Impeachment by Evidence of Conviction of Crime" states:

> General Rule
> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record, if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, and if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted

or (2) involved dishonesty or false statement, regardless of the punishment.

The rule explicity states if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect [emphasis added]. The rule states nothing to the effect of a persons credibility being of paramount importance. The basis for the trial court's ruling itself contravenes the logical reason for the rule. The rule is not designed to find out who is and who is not telling the truth. Both Agent Ochoa and the defendant testified under oath. Petitioner respectfully submits for the consideration of the Court that if the prior convictions proved that the defendant was lying, he would have then had a perjury charge. Here, the prior conviction of burglary and grant theft occurred in 1967, a period of time exceeding twelve years. What possible probative value would a twelve year old crime of burglary and grand theft have on the alledged charges? The June, 1979 conviction of possession of heroin for sale occurred in October of 1978, sentencing minute entry, Appendix I-1, incorporated herein by reference thereto, had absolutely no probative value in regards to the alledged sale charges. Petitioner had been granted appeal bond upon sentencing, the trial and sentencing court finding that probable cause existed to believe that the conviction could be set aside or reversed on appe[illegible] admission of evidence relating to same was overwhelmingly prejudicial to the defendant/petitioner herein. The defense motion in limine. Appendix J-I, incorporated herein by reference thereto, should have been granted, and constitutes reversable error. Id. at R.T., Nov. 8, 1979 at p. 139 lines 11 through 19, excerpt Appendix K-I, incorporated herein by reference thereto:

The Court

The Court finds--I hereby make an explicit finding that the prejudical effect of the evidence of both prior convictions is outweighed by the probative value of those convictions, so I will allow the

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> State to use them, and I further rule that as far as I know, the State versus Sorrel is still the law and the rules of evidence have not changed that, and those facts may be brought out in addition to the other facts.

Petitioner has been unable to find a State versus Sorrel. Respondent's submission that the Petitioner's credibility was of paramount importance is right on point with Petitioner's contention. The defendant being charged with four counts of sales of narcotic to an undercover agent, all occurring on different dates, and placed before one jury, is itself prejudicial. The court held in State v. McClellan, 125 Ariz. 595, 611 P.2d 948 that as the state did not sustain its burden, the motion in limine should have been granted. The error requires reversal, as appellant's credibility was crucial to his defense. Criminal Law Key 1170½(1). Error in admitting two prior 1972 convictions in Massachusetts for purposes of impeaching defendant was of a reversable nature where defendant's credibility was crucial to his defense. 17 A.R.S. Rules of Evid., Rule 609, 609(A). Admissibility of evidence is a matter of state law, and presents no constitutional question unless there is an error of such magnitude that it denies Petitioner fundamental due process. Crisafi v. Oliver, 396 F.2d 293 (9th Cir.), Cert. Denied, 393 U.S. 889 (1968). Petitioner submits for the consideration of the court that State v. McClellan, supra, is the controlling law applicable to Arizona Rules of Evidence, Rule 609, 609(A) and based upon same, Petitioner was denied fundamental due process, substantive due process of law and equal protection of the law, all in contravention and violation of Petitioner's guarded rights, Amendments 5, 6 and 14, U.S.C.A., constituting reversable error.

Reply to Respondent Argument IV

PETITIONER WAIVED ANY OBJECTION TO PROSECUTORIAL COMMENTS BY FAILING TO OBJECT TIMELY.

Id., R.T., Nov. 9th (excerpt Appendix L-I, incorporated herein by reference thereto) at p.47 line 1 through 3, the state prosecutor in closing argument states to the jurors:

> State Prosecutor
>
> Head-on, collidng with the truth told you by the officers is the testimony of Benny Dixon, a convicted felon.

There was no corroboration to Agent Ochoa's testimony and identification of the accused, Benny Dixon, being the person with whom he had dealt with at the three on four separate occasions, as previously documented by Agent Smith's testimony, who was agent Ochoa's backup on all four sales occasions. Respondent does not contest the prejudicial effect of the statement; instead Respondent contends that defense counsel did not object. Petitioner, respectfully, asks this Court what possible objection could have possibly cured the prejudicial effects of the state prosecutor's statement? Defendant's counsel specifically moved for a mistrial. Id., R.T. of Nov. 9, 1979 at p.56 through 59, Appendix M-I, incorporated herein by reference thereto. The Fourteenth Amendment of the Constitution of the United States is a restriction upon the methods used in state courts which violate the due process clause of that amendment. U.S.C.A., Const. Amends. 4, 5, 14. State v. Berg, 259 P.2d 261, 76 Ariz. 96. Respondent submits that failure of Petitioner's counsel to object constitutes waiver for purposes of federal relief. Petitioner respectfully submits that the Court ruled in Humphrey v. Cady, 1972, 92 S.Ct. 1048, 405 U.S. 504, 31, L.Ed. 2d 394 (Mr. Justice Marshall speaking for the Court) that waivers of state court remedies such as will bar Habeas Corpus must be the product of an understanding and knowing

decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel.

Reply to Respondent Argument V

PETITIONER DID IN FACT MAIL A TIMELY NOTICE OF APPEAL TO THE UNITED STATES DISTRICT COURT

Petitioner respectfully reiterates the contentions submitted previously, appertaining to the filing of a timely notice of appeal in the United States District Court. Petitioner's Motion to Rehear was timely filed; Petitioner appealed from the United States District Court Order dated FEbruary 11, 1981 denying Motion to Rehear; Notice of Appeal was dated and mailed March 11, 1981. The United States District Court filing date is March 19, 1981.

Based upon same, the United States Court of Appeals for the Ninth Circuit erred in its determination.

CONCLUSION

Based upon the foregoing respectfully submitted contentions, Petitioner moves this Court to deny Respondent's Response, grant Petitioner's request for Writ of Certiorari, and grant such other and further relief deemed necessary and appropriate.

Respectfully submitted,

Benny Dixon

BENNY DIXON, Petitioner

SUBSCRIBED AND SWORN TO BEFORE ME THIS 16 DAY OF SEPTEMBER, 1981.

My Commission Expires
November 4, 1982

My Commission Expires

NOTARY PUBLIC